FILE COPY

In The

SUPREME COURT OF THE UNITED STATES

E. A. DAWLEY, JR.

Petitioner

v.

CITY OF NORFOLK, VIRGINIA, a
Municipal Corporation, et als

Respondents

# PETITION FOR WRIT OF CERTIORARI

To

UNITED STATES COURT OF APPEALS,
Fourth Circuit

E. A. DAWLEY, JR.
900 E. Liberty Street
Norfolk, Virginia
Counsel for Petitioner

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In The

SUPREME COURT OF THE UNITED STATES

E. A. DAWLEY, JR.
Petitioner

vs.

City of Norfolk, Virginia, a municipal corporation; Thomas F. Maxwell, City Manager, City of Norfolk, Virginia; Calvin H. Dalby, Director of Public Safety, City of Norfolk, Virginia; S. C. Morrissette, Director of Public Works, City of Norfolk, Virginia,
Respondents

# PETITION FOR A WRIT OF CERTIORARI

To The

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

E. A. Dawley, Jr., your Petitioner, prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the Fourth Circuit, entered, filed and dated on the 15th day of October 1958, which decree affirmed a decree of the United States District Court for the Eastern District of Virginia at Norfolk, dismissing your Petitioner's Complaint on the merits.

## OPINIONS BELOW

The opinion of the District Court is reported in 159 F. Supp. 642, and is also printed in the record (Appellant's Appendix, p. 36-A). The per curiam opinion of the Court of Appeals has not been officially reported, to the best of your Petitioner's knowledge, but is printed in the record (pg. 8), and in the Appendix to this petition (pg. 1).

## JURISDICTION

The decree of the Circuit Court of Appeals is dated and was entered on October 15, 1958, a copy of which is appended to the record (record pg. 9) and is printed in the Appendix to this petition (pg. 3-A). The decree of the District Court is printed in the Record (Appellant's Appen. pg. 47-A).

An order dated January 13, 1959, was entered in this cause by the Honorable Earl Warren, Chief Justice of the United States, extending the time for filing a petition for writ of certiorari to and including January 30, 1959.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW ARE AS FOLLOWS

I. Does the presence and maintenance by the Appellees of signs providing for racial segregation of attorneys and other persons in attendance at the Courthouse, violate the federal constitutional and statutory rights of Appellant and other Negro attorneys, as guaranteed by the 14th Amendment to the United States Constitution and 42 U. S. C. 1981, in that the presence and maintenance of said racial signs deny to them the equal protection of the law, violate their privileges and immunities as citizens of the United States, deprive them of their property without due process of law, and subject them to punishment, pains and penalties unlike those to which White persons and attorneys are subjected, i.e., does

the Complaint of Appellant (Record, Appellant's Appendix, pg. 1-A) state a claim against the Respondents, or any of them, upon which relief can be granted?

II. Should the court take judicial notice of the facts contained in Appellant's Motion for Judicial Notice (Record, Appellant's Appendix, pg. 9-A)?

III. Whether the District Court had jurisdiction of the case and if so, whether the court should, in its discretion, exercise the same in a case of this type?

IV. May Appellant's action be maintained as a class action?

V. Do the Respondents have such authority and control over the courthouse building that makes them responsible for the presence and maintenance of said racial signs, and gives them the power to remove same?

## PROVISIONS OF LAW INVOLVED

This case involves the provisions of law cited below with the respective volumes and pages where they may be found in the official editions; the verbatim texts or pertinent portions of which are set forth on that page of the appendix to this petition indicated after said citations:

### FEDERAL LAW

14th Amendment to United States Constitution, U. S. C. United States Constitution, Amendment 14, (pg. 4-A); 42 U. S. C. 1981, Revised Statutes Sec. 1977, (pg. 4-A); 42 U.S.C. 1983, Revised Statutes Sec. 1979 (pg. 4-A); 28 U.S.C. 1331, 62 Stat 1331 (June 25, 1948) as amended by 72 Stat 415 (July 25, 1958),

(pg. 4-A); 28 U.S.C. 1343(3), 62 Stat 932 (June 25, 1948), (pg. 5-A); 28 U.S.C. 2201, 62 Stat 964 (June 25, 1948), as amended 68 Stat 890 (Aug. 28, 1954), 72 Stat 349 (July 7, 1958), (pg. 5-A); 28 U.S.C. 2202, 62 Stat 964 (June 25, 1948), (pg. 5-A); 28 U. S. C. 1254(1), 62 Stat 928 (June 25, 1948) (pg. 5-A).

## LOCAL LAW

Code of Virginia (1950)

Sec. 15-686, Vol 3, pg. 578 (pg. 6-A); Sec. 15-689, Vol. 3, pg. 579 (pg. 6-A); Sec. 15-690, Vol 3, pg. 580 (pg. 7-A); Sec. 15-691, Vol 3, pg 580 (pg. 8-A); Sec. 15-693.1, Vol 3, pg. 582 (pg. 8-A; Sec. 54-42, Vol 7, pg. 338 (pg. 9-A); Sec. 58-266.4, Vol 8, pg. 138 of sup. (pg. 10-A); Sec. 58-371, Vol 8, pg. 440 (pg. 11-A); Sec. 18-327, Vol 4, pg. 245 (pg. 12-A); Sec. 18-328, Vol 4, pg. 245 (pg. 12-A).

NORFOLK CITY CHARTER, Acts of the General Assembly of Virginia (Feb. 7, 1918), Acts 1918, Chapter 34, pg. 31 et seq., sections:

Sec. 49, ch 34, pg. 52 (pg. 15-A); Sec. 50, ch 34, pg. 53, (pg. 16-A); Sec. 52, ch 34, pg. 54, (pg. 17-A); Sec. 59, ch 34, pg. 54, (pg. 19-A).

CODE OF CITY OF NORFOLK (official editions found in Charter and Code of the City of Norfolk, Virginia (1950), sections:

Sec. 1-15, pg. 133, (pg. 14-A); Sec. 2-62(7), pg. 158, (pg. 14-A); Sec. 34-1, pg. 593, (pg. 14-A).

BUILDING CODE OF THE CITY OF NORFOLK, section 2002.1, official edition in separate pamphlet entitled Building Code of the City of Norfolk, Va. 1957, section 2002.1 on page 251, (pg. 15-A).

## STATEMENT OF THE CASE

The Appellant, Plaintiff below, is a citizen of the United States of America and the State of Virginia, and is a domiciliary and bona fide resident of Norfolk, Virginia. He is licensed by the State of Virginia, is authorized, and is in all respects qualified to practice the profession of law in all courts of the State of Virginia; and is now actively engaged in the practice of law in the State of Virginia, especially in Norfolk, Virginia, where he maintains his law offices. The appellant is a Negro. (Affidavit, Record, Appellant's Appendix, Page 16-A)

The Appellees, Respondents below, are a municipal corporation and its chief administrative officials, all of whom are members of the Caucasian race. The City of Norfolk, Virginia, pursuant to state law, provides, maintains, and owns in fee simple absolute a certain courthouse building located in said City, in which is contained solely (a) all the Virginia State Courts of general jurisdiction having jurisdiction of all causes properly cognizable in Norfolk, Virginia, numbering four (4) separate courts; (b) offices for the judges of said courts, all of whom are members of the Caucasian race; (c) a restroom for the exclusive use of two of the judges, and (d) four public restrooms.

The lettering on and, in some cases, over the doors of the four public restrooms is as follows:

"WHITE WOMEN — REST ROOM"

"COLORED WOMEN — REST ROOM"

"REST ROOM (WHITE MEN)"

"REST ROOM (COLORED MEN)"

Appellant complained to the Appellees on several occasions concerning the presence of the signs and requested that the signs be removed because he thought that their presence and maintenance was unlawful and humiliating to Negro attorneys; but to no effect.

The Appellant, suing for himself and allegedly on behalf of other Negro Attorneys at law practicing in Norfolk, Virginia, filed a Complaint (Record, Appellant's Appendix page 1-A) against the Appellees (under 42 U. S. C. 1983; 28 U. S. C. 1331, 1343 (3), 2201 and 2202) alleging, among other things, that the Appellees were maintaining said racial signs, that the presence and maintenance of said signs were humiliating to Negro attorneys and in violation of the 14th Amendment to the Constitution of the United States and Section 1981 of Title 42 of the United States Code, in that the presence and maintenance of the signs deprived Negro attorneys of their property without due process of law, denied to them the equal protection of the law, and subjected them to punishment, pains and penalties unlike those to which white persons and attorneys are subjected. Appellant's complaint prayed for the entry of a declaratory judgment declaring that the presence and maintenance of said signs was unlawful and unconstitutional, and for an injunction restraining and enjoining the Appellees from maintaining said signs. Appellant also filed a motion asking the court to take judicial notice of certain facts (Record, Appellant's Appendix, page 9-A).

The Answer (Record, Appellant's Appendix, page 28-A) and other responsive pleadings, including a

Motion to Dismiss Appellant's Complaint, (Record Appellant's Appendix, page 24-A) admitted practically all of the substantial evidentiary facts. There was and is thus no material evidentiary fact in dispute, and the only issues in this case are issues of law. Thus both parties filed in the District Court motions for summary judgment (Record, Appellant's Appendix, page 26-A and Appellees Appendix, page 1-A). Appellant also filed a motion to strike Appellees' Answer (Record, Appellant's Appendix, page 35-A). After the submission of briefs and oral argument, the District Court overruled Appellant's Motion for Summary Judgment and Motion to Strike Appellees' Answer, sustained Appellees' Motion to Dismiss Appellant's Complaint, treating same as a Motion for Summary Judgment, and entered an Order dismissing Appellant's Complaint.

The District Court held that: I. It had jurisdiction of the case; II. The presence and maintenance of the racial signs was not unconstitutional and did not violate any rights of petitioner; III. It was not proper for the Court to take judicial notice of the facts requested by Petitioner; IV. The Appellees were not solely responsible for the presence and maintenance of the racial signs V. That this action could not be maintained as a class action; and, VI. That it was unnecessary to decide the question of whether the court should in its discretion decline to entertain jurisdiction of this case, in the light of its decisions on the foregoing questions.

On appeal, the Circuit Court of Appeals affirmed the District Court solely on the one issue not decided by the District Court, the Court of Appeals holding

that "Whether or not the Federal Court should take cognizance of the case and grant the relief prayed was within the sound discretion of the District Judge sitting in a court of equity. The matter was one which affected the internal operations of the court of the State and within its power to regulate. Under these circumstances, interference on the part of the Federal court was not required and the action of the District Judge in dismissing the case was in accord with the principles laid down in Pennsylvania v Williams, 294 U. S. 176, 185."

## REASONS FOR GRANTING THE WRIT

The primary meritorious issue in this cause is whether the presence and maintenance by governmental officials of signs providing for racial segregation of attorneys and other persons in attendance in a courthouse building violate the rights of Negro attorneys guaranteed under the 14th amendment and 42 U. S. C. 1981.

Your petitioner says that a writ should be granted for the following reasons:

I. There is involved in the aforesaid issue an important question of Federal constitutional rights seriously affecting the integrity of the judicial system itself, the very source of law and justice.

II. The court of Appeals has, in effect, approved the decision of the District Court on this important federal question, which specific question has not been, but should be decided by this Court.

III. The Court of Appeals has, in effect, approved the decision of the District Court, which held that the maintenance of said racial signs was not a viola-

tion of federal rights, which decision is not in accord and is in conflict in principal and spirit with applicable decisions of this court as hereinafter set forth.

IV. The decision of the Court of Appeals is in conflict with the decision of the Court of Appeals, 10th Circuit, on the same or an analogous matter, as hereinafter set forth.

V. The Court of Appeals has applied the principles of Pennsylvania v Williams, supra, in a novel and clearly erroneous manner and to inapplicable circumstances. Further, while purporting to sustain and affirm the District Court, the opinion and action of the Court of Appeals is not responsive to the opinion and action of the District Court. The recital of the Court of Appeals that the District Judge dismissed the complaint "without prejudice to the right of the Plaintiff to seek an appropriate remedy in the State Court," (on which recital it purportedly based its decision), finds no support in the decision and action of the District Court or in any part of the record. Thus, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## ARGUMENT

### IN SUPPORT OF REASON I.

It is submitted that suggestions of racial distinction in a court house is sui generis, and submit that had the Supreme Court held that racial distinctions made by governmental officials were lawful with reference to schools, transportation, housing and employment, it would nevertheless have held that the

slightest suggestion of racial distinction in a court of law was most reprehensible, unconstitutional and unlawful. Would it not be ironical if the courts, having condemned and enjoined segregation and discrimination in other areas, would hold that racial segregation and discrimination were lawful and permissible in its own courthouse; the fountain from which such decrees and justice spring. The adverse foreign policy potential of this matter can be considered by imagining some communist agency distributing throughout the world pictures of this courthouse and other courthouses in the South decorated with racial signs. Even in dictatorial countries, where there are in fact no fair trials, as we are blessed to have here, great efforts are made that nothing shall appear to suggest the lack of fairness. It is submitted that the presence and maintenance of racial signs in a courthouse destroys the reverence and respect we desire of our judicial system on the part of the public and the world.

## IN SUPPORT OF REASONS II, III, AND IV.

The theory of Appellant's case is set forth in his Motion requesting the Court to take judicial notice of certain facts, (Record-Appellant's Appendix, page 9A). The instant court has decided that segregation is generally interpreted to denote that the Negro is inferior.—Brown et al. vs. Board of Education of Topeka et al. 347 U. S. 483. Therefore, the presence of the instant signs conveys the impression that the persons responsible for the signs maintenance (whom the public believes to be the judges) consider Negroes, including Negro Attorneys, to be inferior. This belief

on the part of the public adversely affects the prestige of Negro Attorneys upon which their ability to earn substantially depends.

It is submitted that the instant case requests the logical extension of the doctrines and theories propounded and implicit in McLaurin vs. Oklahoma State Regents, U. S. Supreme Court, 339 U. S. 637, and Sweatt vs. Painter et al, U. S. Supreme Court, 339 U. S. 629, in which cases the Supreme Court held that the State must give equal treatment to Negro students studying in the state institutions of higher learning, and refrain from segregating or discriminating against them, so that they might well learn their professions. The instant case asks that Negroes be permitted to well practice their professions unfettered by discriminatory conduct and unequal treatment on the part of governmental officials. It is submitted that this case is controlled by A. E. McDonald v. George D. Key et al. 125 Fed. Sup 775, U. S. Court of Appeals, 10th Circuit, 224 F 2nd 608, certiorari denied by U. S. Supreme Court, 350 U. S. 895, which decision of the 10th Circuit is in conflict with the decision in the instant case. The instant case further requests that the doctrine implicit in the aforesaid cases and the case of Brown v. Board of Education, et als., supra, be applied a fortiori to the facts here involved. This Court should review this case since it has never ruled on the validity of racial distinction displayed in a courthouse, the repository of justice. However, the determinations of the inferior courts on the instant question are in conflict in principle and spirit with the holdings of this Court in the aforesaid cases.

IN SUPPORT OF REASON V.

The Court of Appeals assigned, as the basis for affirming the District Court, the correctness of the District Court's decision that it should decline to take cognizance of this case. Whereas, in fact, the District Court did take cognizance of the case, adjudicated it on its merits, but did not decide the sole question on which it was purportedly affirmed, indicating that a decision on same was unnecessary.

The Court of Appeals in basing its decision on the doctrine of Pennsylvania vs. Williams, supra, has in effect held that a Federal Court can, in its discretion, properly refuse to adjudicate a case where there is involved clearly illegal and unconstitutional conduct on the part of a State itself and its officials which violates the rights of citizens, on the sole grounds that such illegal conduct "affected the internal operations of the court of the State and within its power to regulate." This, to your petitioner, is analogous to a court holding that it will not punish or enjoin a crime because it is the criminal's private business and an injunction might embarrass the criminal. There is nothing in Pennsylvania vs. Williams to support this dangerous theory, or to support the determination that that case is applicable to the facts in the instant case.

Respectfully submitted,

E. A. DAWLEY, JR., Petitioner

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# OPINION OF COURT OF APPEALS

## UNITED STATES COURT OF APPEALS
## FOR THE FOURTH CIRCUIT

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No. 7687

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E. A. Dawley, Jr.,
Appellant,

versus

City of Norfolk, Virginia, a municipal corporation; Thomas F. Maxwell, City Manager, City of Norfolk, Virginia; Calvin H. Dalby, Director of Public Safety, City of Norfolk, Virginia; et al.,
Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

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(Argued October 14, 1958. Decided October 15, 1958.)

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Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

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E. A. Dawley, Jr., for Appellant, and Leonard H. Davis, City Attorney of Norfolk, Virginia, (Virgil S. Gore, Jr., Assistant City Attorney of Norfolk, Virginia, on brief) for Appellees.

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PER CURIAM:

E. A. Dawley, Jr., an attorney of the Negro race practicing law at Norfolk, Virginia, seeks in this case a declaratory judgment and a permanent injunction restraining the City of Norfolk, Virginia, and certain of its administrative officers from maintaining certain signs in the State courthouse in that city indicating the segregation of the races in the public restrooms maintained in the building for men and women. The District Judge after hearing, without expressing approval of the practice and without prejudice to the right of the plaintiff to seek an appropriate remedy in the State court, dismissed the complaint. We think this action was properly taken. Whether or not the Federal court should take cognizance of the case and grant the relief prayed was within the sound discretion of the District Judge sitting in a court of equity. The matter was one which affected the internal operations of the court of the State and within its power to regulate. Under these circumstances, interference on the part of the Federal court was not required and the action of the District Judge in dismissing the case was in accord with the principles laid down in Pennsylvania v. Williams, 294 U.S. 176, 185.

Affirmed.

## DECREE OF COURT OF APPEALS

Filed and Entered October 15, 1958.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7687

E. A. DAWLEY, JR.,
Appellant
vs.

City of Norfolk, Virginia, a municipal corporation; Thomas F. Maxwell, City Manager, City of Norfolk, Virginia; Calvin H. Dalby, Director of Public Safety, City of Norfolk, Virginia S. C. Morrissette, Director of Public Works, City of Norfolk, Virginia
Appellees.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed, with costs. October 15, 1958.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit

November 20, 1958, mandate issued and transmitted to the Clerks of the United States District Court at Norfolk, Virginia.

November 20, 1958, record on appeal returned to the Clerk of the United States District Court at Norfolk, Virginia.

## VERBATIM TEXT OR PERTINENT PORTIONS OF PROVISIONS OF LAW INVOLVED

### Federal Law

14th Amendment to the Constitution of the United States: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . " 42 U. S. C Section 1981: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of all persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 28 U. S. C., 1331: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

28 U. S. C. 1343: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) . . .

(2) . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

28 U. S. C. 2201: "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of any appropriate pleading, may declare the rights or other legal relations of any interested party seeking such declarations, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be receivable as such."

28 U. S. C. 2202: Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U. S. C. 1254 (1): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) . . ."

## Local Law

EXCERPTS FROM VIRGINIA CODE, 1950

Section 15-686. Courthouse, clerk's office and jail to be provided by supervisors and council.—There shall be provided by the board of supervisors of every county and the council for every city a courthouse, clerk's office and jail. The cost thereof and of the land on which they may be, and of keeping the same in good order, shall be chargeable to the county or city. The fee simple of the lands shall be in the county or city, and the supervisors of the county or the council of the city may purchase so much land, as, with what it has, will make two acres, whereof what may be necessary for the purpose shall be occupied with the courthouse, clerk's office and jail and the residue planted with trees and kept as a place for the people of the county or city to meet and confer together; provided, however, that any portion of said lands owned by a county and located within a city or town, and not actually occupied by the courthouse, clerk's office or jail, may be sold or exchanged and conveyed to the said city or town to be used for street or other public purposes. Any such sale or exchange by the board of supervisors of a county shall be made in accordance with the provisions of Section 15-692. The requirements of two acres shall not apply as to any tract consisting of at least one acre which may be conveyed to a county by a city for use as a courthouse and clerk's office. (Code 1919, Sec. 2854; 1920, p. 342; 1922, p. 771; 1924, p. 509; 1926, p. 795; 1932, p. 473; 1936, p. 185; 1942, p. 96; 1948, p. 291; 1954, c. 264; 1956, c. 329.)

Section 15-689. Providing offices for various of-

ficers, judges, etc.—The board of supervisors of each county or the council of each city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, Commonwealth's attorney, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city. And the board of supervisors of any county or the council of any city may, if there be offices in their respective courthouses available for such purposes, provide offices for the judge of any court sitting in the county or city, and any judge of the Supreme Court of Appeals who may reside in the county or city, and if such offices are not available in the courthouse, they may be provided by the board of supervisors or council, if they deem it proper, elsewhere than in the courthouse of the county or city. (Code 1919, Sec. 2854; 1920, p. 342; 1922, p. 771; 1924, p. 510; 1926, p. 795; 1932, p. 473, 1936, p. 185; 1942, p. 96; 1948, p. 292.)

Section 15-690. Renting rooms in courthouse.—With the approval of the judge of the circuit or corporation court, any vacant rooms in the courthouse, after furnishing offices to such officers, may be rented for a term of not exceeding one year to other persons for office purposes, and any public room or hall in the building may be hired for compensation for the purpose of giving public entertainments. All monies received by the counties or cities under this section, shall constitute a fund to maintain and care for such building. (Code 1919, Sec. 2854; 1920, p. 342; 1922, p. 772; 1924, p. 510; 1926, p. 795; 1932, p. 473; 1936, p. 185; 1942, p. 97; 1948, p. 292.)

Section 15-691. Leasing or other use of other buildings.—When the board of supervisors of any county or the council or other governing body of the city, providing land for the courthouse, clerk's office and jail purposes, shall have purchased or may hereafter purchase any land, a part of which has valuable buildings thereon, whether when so purchased or since constructed, and that portion of the land so occupied by such buildings, or the buildings thereon, is, in the discretion of such board, council or other governing body, not required for the purposes mentioned in Sec. 15-689, such board, council or other governing body, if deemed proper by it, may either lease such building or buildings for private or other purposes, or remodel and use the same for a market house or for other public purposes, or both, although such lease or use may reduce the total to less than two acres, and although as much as two acres may never have been acquired. But such lease or use shall be first approved by the judge of the circuit court of the county, or of the corporation court of the city, as the case may be, and such lease or use shall be terminated when, in the opinion of such judge, such building or buildings or the land occupied by the same, is needed for the purposes of a courthouse, clerk's office, or jail. (Code 1919, Sec. 2854; 1920, p. 342; 1922, p. 772; 1924, p. 510; 1926, p. 796; 1932, p. 474; 1936, p. 185; 1942, p. 97; 1948, p. 292.)

Section 15-693.1. Circuit and corporation courts to order courthouses to be repaired.—When it shall appear to the circuit court of any county or the cor-

poration court of any city, from the report of persons appointed to examine the courthouse, or otherwise, that the courthouse of such county or city is insecure or out of repair, or otherwise insufficient, such court shall award a rule, in the name and on behalf of the Commonwealth against the supervisors of the county, or the members of the council of the city, as the case may be, to show cause why a peremptory mandamus should not issue, commanding them to cause the courthouse of such county or city to be made secure, or put in good repair, or rendered otherwise sufficient, as the case may be, and to proceed as in other cases of mandamus, to cause the necessary work to be done.

If in the progress of such proceedings any of the defendants die, or go out of office, their successors may be made parties by the service of a notice in writing to appear and defend the proceedings; and the cause shall thereafter proceed against them as defendants. The vacation of his office otherwise than by death shall not relieve any of the parties from a liability already incurred, whether the penalty has already been imposed or not.

The jurisdiction vested by this section in the circuit courts shall be exercised also by the Hustings Court of the city of Richmond. (Code 1919, Sections 2865-2867.)

Section 54-42. Who may practice law.—The following persons may practice law in this State:

All persons, male and female, who have heretofore obtained, or may hereinafter obtain, a license to so practice under the laws of this State, and whose

license has not been revoked, and who have paid the license tax prescribed by law.

Any person duly authorized and practicing as counsel or attorney at law in any state or territory of the United States, or in the District of Columbia, may for the purpose of attending to any case he may occasionally have in association with a practicing lawyer of this State practice in the courts of this State, in which case no fee shall be chargeable against such nonresident attorney.

Section 58-266.4. Situs for Local License Taxation.—(a) Situs for local license taxation of practitioners of professions.—The situs for the local license taxation of every practitioner of a profession which the State regulates by law shall be the city, town or county in which such a practitioner maintains his office; provided, however, that if any such person maintains any branch office in any other city, town or county, the city, town or county in which such branch office is located may impose a local license tax on him, but if such local license tax be measured by volume, the volume on which the tax may be computed shall be the volume attributable to practice in the city, town or county in which such a branch office is maintained, and any volume so includable in the base for measuring such tax shall be deductible from the base in computing any local license tax measured by volume imposed on him by the city, town or county in which he maintains his principal office. If any practitioner of a profession which the State regulates by law does not maintain any office, the situs for the local license taxation of such a practitioner shall be the city, town or county

in which such person maintains his place of abode, if he has a place of abode in this State, otherwise the situs shall be each city, town or county in which he practices his profession. The word "volume," as used in this paragraph means gross receipts or other base for measuring a license tax which is related to the amount of business done.

(b) Operation of section.—The foregoing provisions of this section shall apply and are restricted to every city, town and county which possess the authority to levy local license taxes under other provisions of law, including charter provisions. Nothing in this section contained shall be construed as authorizing any city, town or county to levy any local license tax of any kind or class in any case in which the authority to levy such a local license tax is not conferred by other provisions of law, including charter provisions, nor shall anything in this section contain be construed as enlarging the existing authority of any city, town or county to levy local license taxes. This section shall prevail over any other statutory provision heretofore enacted in conflict with it, and it shall prevail over any provision of any charter of any city or town in conflict with it.

(c)—

(d)—

Section 58-371. Attorneys at Law.—Every practicing attorney at law, in addition to being licensed, sworn and admitted to prosecute or defend actions or other proceedings in the courts of this Commonwealth, shall obtain a revenue license; and no person shall act as attorney at law or practice law in any court of this Commonwealth without a separate reve-

nue license. A revenue license to practice law in any county or city shall authorize such attorney to practice in all the courts of this State without additional license. Every attorney at law who has been licensed for less than five years shall pay fifteen dollars; and every attorney who has been licensed and who has practiced for five years and more, twenty-five dollars; provided, that no attorney at law shall be required to pay more than fifteen dollars whose receipts for the preceding year were less than five hundred dollars.

Section 18-327. Duty to Separate Races at Public Assemblage.—Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall theater, opera house, motion picture show or place of public assemblage certain seats therein to be occupied by white persons and a portion thereof; or certain seats therein, to be occupied by colored persons and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense.

Section 18-328. Failure to Take Space Assigned in Pursuance of Preceding Section.—Any person who fails, while in any public hall, theater, opera house,

motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the manager, usher or other person in charge of such public hall, theater, opera house, motion picture show or place of public entertainment or public assemblage or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher or other person, as aforesaid, to change his seat from time to time as occasion requires, in order that the preceding section may be complied with, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars or more than twenty-five dollars for each offense. Furthermore such person may be ejected from such public hall, theater, opera house, motion picture show or other place of public entertainment or public assemblage by any manager, usher or ticket taker, or other person in charge of such public hall, theater, opera house, motion picture show or place of public entertainment or public assemblage, or by a police officer or any other conservator of the peace, and if such person ejected shall have paid admission into such public hall, theater, opera house, motion picture show, or other place of public entertainment or public assemblage, he shall not be entitled to a return of any part of the same.

## EXCERPTS FROM CODE OF CITY OF NORFOLK, VIRGINIA

Section 1-15. Building Code of the City of Norfolk, 1958.—The construction, equipment, alteration and repair, removal and demolition of buildings and structures in the city and the fees therefor shall be governed by the provisions of an ordinance, adopted by the council on March 9, 1948, entitled "An ordinance providing a Building Code for the City of Norfolk, prescribing penalties for its violation, and repealing all ordinances in conflict with the provisions thereof" and by all amendments thereto.

The Building Code is available in a pamphlet published separately.

## ARTICLE VI. DEPARTMENT OF PUBLIC WORKS

Section 2-62. Divisions in department.—There shall be in the department of public works the following divisions:

(4)—
(5)—
(6)—

(7) Division of building inspection, which, subject to the supervision and control of the director of public works, shall be in charge of all matters pertaining to the erection, maintenance, occupancy, repair and inspection of buildings, and shall be charged with all matters relating to the enforcement of the Building Code.

Section 34-1. Duties of director of public safety with reference to public buildings, public places, etc.; consent required for meeting in public building.—

Except as otherwise specifically provided, the director of public safety shall have the general supervision of the courthouse, and all other buildings, of boulevards, squares and other public places and grounds belonging to the city or dedicated for public use. No person shall use or occupy any of said buildings, for the purpose of holding any political or other meeting, without the consent, in writing, of said director. (1944, Sec. 1000.)

## EXCERPTS FROM SECTION 2002.1 OF THE BUILDING CODE OF THE CITY OF NORFOLK, 1957.

"... Where negroes and whites are accommodated there shall be separate toilet facilities provided for the former, marked plainly 'For Negroes Only'."

## EXCERPTS FROM CITY CHARTER

Section 49. Appointment, qualifications, etc.— The city manager shall be the administrative head of the municipal government. He shall be chosen by the council without regard to his political beliefs, and solely upon the basis of his executive and administrative qualifications. The choice shall not be limited to inhabitants of the city or state, unless otherwise required by the Constitution of the state. The city manager shall receive such compensation as shall be provided by the council by ordinance. He shall be appointed for an indefinite period, and shall serve at the will of the council; provided, however, that he may not be removed within twelve months from the date on which he assumed his duties, except for incompetence, malfeasance, misfeasance or neglect of

duty. In case of his removal within said period he may demand written charges and a public hearing thereon before the council prior to the date on which his final removal shall take effect; but the decision and action of the council on such hearing shall be final, and pending such hearing the council may suspend him from duty. During the absence or disability of the city manager, the council shall designate some properly qualified person to perform his duties.

Section 50. Powers and duties of city manager.—The city manager shall be responsible to the council for the efficient administration of all affairs of the city. He shall have power, and it shall be his duty:

(a) To see that all laws and ordinances are enforced.

(b) Except as otherwise provided in this Charter, to appoint all heads or directors of departments, and all subordinate officers and employees of the city in both the classified and unclassified service with the power to discipline and remove any officer or employee so appointed; and in the classified service all appointments and removals to be subject to civil service provisions of this Charter.

(c) To exercise supervision and control over all departments and divisions created herein, or that may be hereafter created by the council.

(d) To attend all regular meetings of the council, with the right to take part in the discussion, but having no vote. He shall be entitled to notice of all special meetings.

(e) To recommend to the council for adoption such

measures as he may deem necessary or expedient.

(f) To see that all terms and conditions imposed in favor of the city, or its inhabitants, in any public utility franchise, are faithfully kept and performed; upon knowledge of any violation thereof, to call the same to the attention of the city attorney, whose duty it shall be forthwith to take such steps as are necessary to protect and enforce the same.

(g) To make and execute all contracts on behalf of the city except as may be otherwise provided in this Charter or by ordinances passed in pursuance thereof.

(h) To act as budget commissioner, and as such to prepare and submit to the council the annual budget, after receiving estimates made by the heads or directors of the departments, or of any board or commission not within a department.

(i) To keep the council at all times fully advised as to the financial condition and needs of the city.

(j) To perform all such other duties as may be prescribed by this Charter, or be required of him by ordinance or resolution of the council.

Section 52. Creation of departments.—The following administrative departments are hereby created:

(a) Department of law;
(b) Department of public works;
(c) Department of public welfare;
(d) Department of public safety;
(e) Department of finance.

The council may, by ordinance adopted by the affirmative vote of at least four of its members, cre-

ate new departments or subdivisions thereof, combine or abolish existing departments, and distribute the functions thereof, or establish temporary departments for special work.

At the head of each department there shall be a director; provided, that until the council shall otherwise provide by ordinance adopted by the affirmative vote of at least four of its members, the city manager shall be the director of the department of public safety, and of the department of finance.

The director of each department shall be chosen on the basis of his general executive and administrative ability and experience, and of his education, training and experience in the class of work which he is to administer.

The director of each department, except the department of law, shall be appointed by the city manager, and may be removed by him at any time.

The directors of the several departments shall be immediately responsible to the city manager for the administration of their respective departments, and their advice, in writing, may be required by him on all matters affecting their departments. They shall prepare departmental estimates, which shall be open to public inspection, and they shall make all other reports and recommendations concerning their departments at stated intervals, or when required by the city manager, under such rules and regulations as he may prescribe.

Editor's note.—This section was amended by Acts 1950, ch. 428, by which the council was increased from five members to seven members, which amend-

ment was ratified in the general election held Tuesday, November 7, 1950. It is provided therein that the amendment to section 52 should be effective on September 1, 1952.

A department of public health was established by Ordinance No. 11,497, adopted by the council on February 26, 1946, effective on and after March 15, 1946.

A department of parks and recreation was established by Ordinance No. 14,231, adopted by the council on February 21, 1950, effective on and after March 1, 1950.

Section 59. General powers and duties.—The head of the department of public safety shall be known as the director of public safety.

Subject to the supervision and control of the city manager in all matters, he shall be the executive head of the divisions of police and fire. He shall also be the chief administrative authority in all matters pertaining to the erection, maintenance, repair, occupancy and inspection of buildings under such regulations as may be ordained by the council.

Editor's note.—By Ordinance No. 14,236, adopted by the council on February 21, 1950, effective on and after March 1, 1950, the bureau of markets and the bureau of standards were transferred from the department of public welfare to the department of public safety.

ILE COPY

Supreme Court, U.S.
FILED
FEB 25 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 674

E. A. DAWLEY, JR.,
*Petitioner,*

*v.*

CITY OF NORFOLK, VIRGINIA, a municipal corporation; THOMAS F. MAXWELL, City Manager, City of Norfolk, Virginia; CALVIN H. DALBY, Director of Public Safety, City of Norfolk, Virginia; and S. C. MORRISETTE, Director of Public Works, City of Norfolk, Virginia,
*Respondents.*

*On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit*

## BRIEF FOR RESPONDENTS IN OPPOSITION

LEONARD H. DAVIS,
*City Attorney*
Room 312, City Hall Building,
Norfolk 10, Virginia.

VIRGIL S. GORE, JR.,
*Assistant City Attorney*
Room 312, City Hall Building,
Norfolk 10, Virginia.

*Counsel for Respondents.*

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*On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinon of the District Court is reported at 159 F. Supp. 642[1]. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported at 260 F. 2d 647[2].

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

[1]For convenience in examining the several references thereto, this opinion is re-printed as Appendix A to this Brief.

[2]This opinion is re-printed as Appendix B to this Brief.

## QUESTIONS PRESENTED

Questions II, III, IV and V, set forth on page 3 of the Petition, are presented but they should be stated, in the order of their importance, as follows:

1. Did the District Court have jurisdiction of this cause and, if it did, should that Court, in the exercise of its discretion, have taken jurisdiction?

2. Do the respondents have such authority and control over the courthouse building that they are responsible for the presence and maintenance of the signs in question and have the power to remove them?

3. Can this cause be maintained as a class action?

4. Should the District Court have granted petitioner's motion that the Court take judicial notice of certain statements set forth therein and alleged to be facts?

## QUESTION NOT PRESENTED

Question I, as set forth on pages 2 and 3 of the Petition, is not presented. That question involves the controversial issues, including those of whether or not the presence of the signs is in violation of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1981, as to which no evidence was introduced and which were never reached by either the District Court or the Court of Appeals.

(The general question of whether or not petitioner's complaint states a claim against respondents, or any of them, upon which relief can be granted is embraced within the questions presented, but not in the sense stated by petitioner in his question I.)

## CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULE INVOLVED

The constitutional provisions, statutes and ordinances involved are adequately set forth in the Petition.

Rule 23 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., is also involved and is printed as Appendix C to this Brief.

## STATEMENT OF THE CASE

The City of Norfolk, Virginia, owns a certain courthouse building, situated in the City, which is occupied and used solely and exclusively by the Corporation Court, Corporation Court Part Two, Court of Law and Chancery and Circuit Court of the City of Norfolk, and the respective Judges thereof. All of these courts are state courts and all of these judges are state judges. No arm or branch of the city government is housed in this building. The City keeps the building in repair. (R. Appellant's App. 3-A, 26-A, 29-A; Appellees' App. 1.)

There are four public rest rooms or toilets in the building. Painted above or on the doors to these rooms are signs which read, respectively, as follows:

REST ROOM
(COLORED MEN)

REST ROOM
(WHITE MEN)

WHITE WOMEN
REST ROOM

COLORED WOMEN
REST ROOM

These rooms and signs exist now as they have existed for a number of years. (R. Appellees' App. 4-12.) These signs are the subject of this case. (R. Appellant's App. 5-A—8-A.)

The petitioner, plaintiff below, is a duly licensed Negro attorney practicing in the City of Norfolk, Virginia. He is a citizen of the United States and the State of Virginia, is domiciled in and is a resident of the City of Norfolk. He instituted this alleged class action ". . . for himself and on behalf of other similarly situated, viz, Negro attorneys at law practicing in Norfolk, Virginia . . ." against the respondents, who are the City of Norfolk, Virginia, and certain administrative officials of the City. (R. Appellant's App. 1-A—5-A.)

There are only fifteen Negro attorneys at law who obtained their State of Virginia professional revenue licenses in the City of Norfolk. (R. Appellees' App. 2.)

Petitioner's complaint invoked the jurisdiction of the District Court under 28 U.S.C. 1343 (3) and 42 U.S.C. 1983, 28 U.S.C. 1331, and 28 U.S.C. 2201 and 2202 (R. Appellant's App. 2-A); alleged that the respondents maintained the signs, which have just been described, in violation of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1981 (R. Appellant's App. 5-A—7-A); sought a judgment declaring that the presence and maintenance by the respondents of the signs is a violation of and repugnant to the Fourteenth Amendment and 42 U.S.C. 1981 and is, therefore, unconstitutional and unlawful; and sought a permanent injunction restraining the respondents from maintaining such signs. (R. Appellant's App. 8-A.)

The petitioner's allegations that the respondents main-

tained the signs in violation of the Fourteenth Amendment and 42 U.S.C. 1981 are contained in paragraphs 7 through 12 of his complaint. (R. Appellant's App. 5-A–7-A.) In their answer, the respondents expressly denied all of those allegations. (R. Appellant's App. 32-A—33-A.) Therefore, the statements set forth at pages 6 and 7 of the Petition reading:

> "The Answer . . . and other responsive pleadings, . . admitted practically all of the substantial evidentiary facts. There was and is thus no material evidentiary fact in dispute, and the only issues in this case are issues of law. . . ."

are not correct.

Petitioner did not offer any oral evidence or affidavit purporting to establish the allegations contained in said paragraphs 7 through 12 of his complaint and, there being no occasion for the respondents to introduce evidence in support of their denials, the record does not contain any facts relating to that aspect of the case. Petitioner apparently sought to prove his said allegations by his motion for judicial notice (R. Appellant's App. 9-A–15-A), which motion was disapproved by the District Court (App. A 9).

There was no dispute as to the facts relating to the only four questions which are now presented and no oral evidence was introduced.

The District Court disposed of the case after hearing arguments and receiving briefs on the motions filed, which included respondents' motion for summary judgment, with supporting affidavits (R. Appellees' App. 1–22), petitioner's motion to strike the respondents' answer (R. Appellant's App. 35-A), and petitioner's motion for summary

judgment (R. Appellant's App. 36-A), with supporting affidavits (R. Appellant's App. 16-A–23-A).

The District Court sustained respondents' motion for summary judgment and denied petitioner's motions to strike respondents' answer and for summary judgment. (R. Appellant's App. 47-A.) In so doing, the District Court:

1. Held that it had jurisdiction, but only by virtue of 28 U.S.C. 1343 (3). (App. A 4).

2. Stated, in effect, that were it not for the fact that respondents had to prevail, the Court would have been inclined to exercise its discretion in declining to take jurisdiction. (App. A 4, 5).

3. Held that the case could not be maintained as a class action. (App. A 8, 9).

4. Held that the judges of the courts housed in the courthouse building have the control over the building and that the case had to be dismissed for the reason that the respondents do not have control over the building. (App. A 7, 8).

5. Did not rule on, but expressed disapproval of, petitioner's motion for judicial notice. (App. A 9).

The District Court did not hold, as stated at page 7 of the Petition, that ". . . The presence and maintenance of the racial signs was not unconstitutional and did not violate any rights of petitioner. . . ." The District Court expressed disapproval of the theory upon which petitioner proceeded, but that is as far as the Court went. (App. A 2–4.)

The Circuit Court of Appeals affirmed the District Court. (App. to Petition 3-A.) In doing so, the Court of Appeals did not affirm the District Court solely on an issue

not decided by the District Court, as asserted by petitioner at pages 7 and 8 of the Petition, but simply followed another route in reaching the same conclusion as the District Court. (App. B 11.)

## ARGUMENT

### I.

### Introduction

Petitioner advances the following reasons for granting certiorari:

1. There is involved the important federal question of whether or not the presence and maintenance of the signs violate rights guaranteed to Negro attorneys by the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. 1981.

2. The District Court, contrary to the principle and spirit of certain applicable decisions of this Court, decided this question in the negative and the Circuit Court of Appeals has approved the decision of the District Court.

3. This question has not been, but should be, decided by this Court.

4. The decision of the Court of Appeals for the Fourth Circuit is in conflict with a certain decision of the Court of Appeals for the Tenth Circuit.

5. The Circuit Court of Appeals applied the principles of *Pennsylvania* v. *Williams*, 294 U.S. 176, 79 L. ed. 841, erroneously and was not responsive to the opinion and action of the District Court, with the result that it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2.

**There Is No Important Question of Federal Law.**

Petitioner asserts that "the primary meritorious issue in this cause" is whether or not the presence and maintenance of the signs violate rights guaranteed to Negro attorneys by the Fourteenth Amendment and 42 U.S.C. 1981. Such is not the case. This issue was not reached by either the District Court or the Circuit Court of Appeals, and it can never be reached in this case for the reason that the respondents do not control the courthouse building or the signs therein about which petitioner complains. Even if the signs do infringe upon petitioner's rights (which the respondents emphatically deny), there is nothing the respondents can do about it.

The primary issue in this cause is whether or not the respondents have such authority and control over the courthouse building that they are responsible for the presence and maintenance of the signs and have the power to remove them. This is not a federal question.

The legislature of Virginia has vested the control over the courthouse building, and every part thereof, in the judges of the state courts housed therein (or in the Judge of the Corporation Court therein, which for the purpose of this case amounts to the same thing). This is apparent from the various statutes relating to the courthouse building which the legislature has enacted. These statutes have been codified as the various sections of the Code of Virginia, 1950, set forth in following paragraphs. (The emphasis placed on certain portions of these sections is that of respondents.)

§ 15-686 requires the council of every city to provide

a courthouse and requires the city to pay the cost thereof and *of keeping the same in good order.*

§ 15-693.1 provides that when it shall appear to *the corporation court* of any city that the courthouse of such city *is insecure or out of repair, or otherwise insufficient, such court* shall award a rule against the members of the council of the city to show cause why a peremptory mandamus should not issue, *commanding them to cause the courthouse to be made secure, or put in good repair, or rendered otherwise sufficient, and to proceed as in other cases of mandamus, to cause the necessary work to be done.*

§ 15-689 directs and authorizes the council of the city to provide offices in the courthouse building, if any are available, for certain *state* officials and judges.

§ 15-690 authorizes the city to rent, for limited terms and purposes, any vacant rooms in the courthouse, after furnishing offices to the state officials and judges (as provided in § 15-689), *but only with the approval of the judge of the corporation court.*

§ 15-691 authorizes the council of the city to lease or use, other than for a courthouse, any excess of land or buildings acquired for a courthouse, *provided, such lease or use shall be first approved by the judge of the corporation court of the city, and such lease or use shall be terminated when, in the opinion of such judge, such land or buildings is needed for the purposes of a courthouse.*

3.

**The District Court Did Not Decide the Question of Whether or Not the Presence and Maintenance of the Signs Violate Rights Guaranteed to Negro Attorneys.**

That the District Court did not decide this question is obvious from the reading of the memorandum filed by the District Judge (App. A). Any effort to elaborate upon this statement would result in unnecessary repetition of that memorandum, and respondents believe that it is sufficient to make particular reference to the portions thereof re-printed at pages 2 to 4 of Appendix A (for the District Court's expression of disapproval of petitioner's theory) and at pages 4 to 9 of Appendix A (for the questions which the District Court decided).

4.

**The Question of Whether or Not the Presence and Maintenance of the Signs Violate Rights Guaranteed to Negro Attorneys Cannot Be Decided by This Court in This Case.**

It has been demonstrated in this Brief that the respondents do not control and cannot do anything about the signs and that, for this reason if none other, there is no occasion for this Court to decide whether or not the signs violate rights of Negro attorneys.

In addition, it is suggested that this question is not one which commands the attention of this Court. The cases of *Brown* v. *Board of Education*, 347 U.S. 483, 98 L ed 873, *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 94 L ed 1149, and *Sweatt* v. *Painter*, 339 U.S. 629, 94 L ed 1114, upon which petitioner relies, involved the education of elementary and high school pupils and college students

and the necessity for them to be able to associate with each other and exchange ideas in order to obtain a complete education. Public toilets do not involve such considerations.

Furthermore, in the words of the District Court (App. A 4, 5); ". . . The matter involved, as presented by the pleadings herein, is exclusively one cognizable by the state courts. . . ."; and, in the words of the Circuit Court of Appeals (App. B 11), ". . . The matter was one which affected the internal operations of the court of the State and within its power to regulate. Under these circumstances, interference on the part of the Federal court was not required . . ."

5.

## There Is No Conflict Between the Fourth and Tenth Circuits.

Petitioner urges that this case is controlled by *McDonald* v. *Key*, 224 F. 2d 608 (C. A. 10) cert den 350 U.S. 895, 100 L ed 787, and that the decision of the Tenth Circuit in the *McDonald* case is in conflict with the decision of the Fourth Circuit in this case. Petitioner is in error. The subject of this case bears no relationship to the subject of the *McDonald* case and the decision in the *McDonald* case has no bearing on this case. The *McDonald* case was a voting case and involved a constitutional provision of Oklahoma which provided that the phrase "white race" included not only that race but all other races, except the Negro. *Because of this constitutional provision*, the Court of Appeals for the Tenth Circuit held that there was a direct discrimination between members of the Negro race and members of the White, Yellow, and other races, all embraced in the phrase "white race."

6.

**The Decision Below Is Correct and Does Not Call for the Exercise of This Court's Power of Supervision.**

We submit that it was clear to both the District Court and the Circuit Court of Appeals that their judgments should be in favor of the respondents, either on the principles of *Pennsylvania* v. *Williams*, 294 U.S. 176, 182, 185, 79 L. ed. 841, 846, 847-8 (App. B), or on the other grounds set forth in the memorandum filed by the District Judge (App. A). Both bases for the decisions are sound and the decision of the Circuit Court of Appeals is none the less correct because the Court adopted the basis which the District Court could have but did not adopt.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD H. DAVIS,
*City Attorney*
Room 312, City Hall Building,
Norfolk 10, Virginia.

VIRGIL S. GORE, JR.,
*Assistant City Attorney*
Room 312, City Hall Building,
Norfolk 10, Virginia.

*Counsel for Respondents.*

## MEMORANDUM

In this action by way of declaratory judgment, plaintiff, a Negro attorney at law practicing in the City of Norfolk, Virginia, seeks a mandatory injunction against the defendants to require them to remove the word "Colored" from the doors of certain rest rooms in a courthouse building occupied and used exclusively by four state courts and the judges thereof. Plaintiff concedes that the rest rooms are equal in every respect. The lettering on the doors of the four rest rooms are indicated respectively as follows:

"White Women— Rest Room"
"Colored Women — Rest Room"
"Rest Room (White Men.)"
"Rest Room (Colored Men)"

For many years the lettering on these doors has remained the same. The toilet facilities have been, and are now, being used by persons having business in the various courts, such as jurors, attorneys, witnesses, parties litigant, and judges. One of the three water closets in facilities marked "Rest Room (White Men)" is for the exclusive use of the judges of the Circuit Court and the Court of Law and Chancery. The rest rooms are otherwise open during all daylight hours—no keys are required to gain admittance—and no guards are maintained to keep any individual from entering any particular rest room.

Plaintiff contends that the presence and maintenance of the aforesaid signs by defendants is in violation of, and repugnant to, the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C.A. §1981, and is therefore unconstitutional and unlawful.

Both plaintiff and defendants have filed motions for summary judgment and, in addition, defendants have filed a motion to dismiss. The questions thus presented may be stated:

(1) Does this Court have jurisdiction over the subject matter of this action?

(2) If jurisdiction exists, should the Court exercise the same in an action of this type?

(3) May this action be maintained as a class action?

(4) Does the complaint state a claim against the defendants, or any of them, upon which relief can be granted?

(5) Should the Court take judicial notice of facts and certain conclusions alleged by plaintiff in his motion for summary judgment?

The theory upon which plaintiff proceeds is, to say the least, ingenious. Upon argument he practically conceded that the judges of the four state courts had control over the signs in question. In fact, he insists that the public has this impression and he argues that it is the general public from whom attorneys are able to secure their means of livelihood. For this reason, plaintiff contends, the presence of these signs conveys the thought that the judges consider Negro attorneys inferior which, in turn, adversely affects the prestige of Negro attorneys in the eyes of the public and thereby diminishes their earning capacity. Plaintiff rests his case upon the statement of the United States Supreme Court in *Brown v. Board of Education*, 347 U. S. 483, wherein it is stated that segregation generates a feel-

ing of inferiority as to their status in the community[1]. But it is clear from an examination of *Brown*, supra, that the Court did not intend to suggest that all segregation, whether voluntary or otherwise, imports inferiority to the Negro race. According to plaintiff, he does not complain of segregated toilets, but states that the issue is confined to the maintenance of discriminatory signs in an American court, and whether such action is lawful.

With this highly sociological approach the Court is in disagreement. Irrespective of the wisdom of maintaining separate white and colored toilet facilities in a state courthouse, there is no more reason to suggest that judges deem Negro attorneys inferior than there is to say that a white attorney is inferior because he may use a rest room marked "White." In federal buildings throughout Virginia, where separate facilities for colored and white have generally been abolished, it in no sense increases or decreases the prestige of any attorney in the mind of the judge or the public. To say that there is a loss of earning power, or a denial of equal protection of laws, or a denial under color

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[1] Plaintiff has misinterpreted the language of the Supreme Court in taking a statement out of context. Preliminary to making the statement referred to, the Court pointed out that in *McLaurin v. Oklahoma State Regents*, 339 U. S. 637, in requiring that a Negro admitted to a white graduate school be treated like all other students, resort should be had to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general to learn his profession." Then follows: "Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." The Court then proceeds to quote from the Kansas case relating to segregation in public schools wherein it is said that the policy of separating the races is *usually* interpreted as denoting the inferiority of the Negro group. It should be noted that the Supreme Court at no time has said that *all* segregation denotes inferiority of the Negro

of law of equality of treatment, would reduce the law to an absurdity.

The jurisdiction apparently rests in this Court to entertain this type of action under the Civil Rights Act, 28 U.S.C.A., §1343(3)[2]. Plaintiff likewise contends that jurisdiction is invoked under 28 U.S.C.A., §1331, in that the matter in controversy arises under the Constitution, laws or treaties of the United States, and the amount in controversy exceeds $3000.00, exclusive of interest and costs. With this last statement, the Court is not in accord as it appears to a legal certainty that plaintiff's claim involves nothing in money value. *St. Paul Indemnity Co. v. Cab Co.*, 303 U.S. 283, 288-290. If the jurisdictional amount were necessary to confer jurisdiction, the action would clearly be in bad faith. However, the jurisdictional amount is of no importance in cases arising under the Civil Rights Act.

Plaintiff, for reasons not revealed of record, has instituted no action in the state courts seeking similar relief. If it were necessary to so decide, the Court would be inclined to exercise its discretion in declining to entertain the claim under the doctrine of *Pennsylvania v. Williams*, 294 U. S. 176, 182. The matter involved, as presented by the pleadings herein, is exclusively one cognizable by the state

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[2] Title 28, U.S.C., §1343, reads as follows:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

courts. While federal courts have been frequently called upon to pass upon questions involving state laws and practices which clearly impinge upon the rights of individuals as violative of constitutional rights, the exercise of such jurisdiction must be with caution, and there is probably no clearer illustration of such approach than in the case at bar wherein the plaintiff is, in effect, requesting the federal court to instruct his brethren on the state court as to how they should "keep their own house in order." However, aside from this point, the plaintiff's case must fail for a variety of reasons.

There exists no state statute in Virginia requiring the maintenance of separate rest room facilities for colored and white [3]. In the Building Code of the City of Norfolk there is a provision [4] to the effect that separate rest rooms shall be provided, but there is no criminal penalty which may

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[3] Plaintiff suggests that §18-327 and §18-328 of the Code of Virginia, 1950, are applicable. These controversial statutes relate to the duty to separate the seats of the races and the duty to take seats assigned at any public hall, theatre, opera house, motion picture show, or any place of public entertainment or public assemblage. The constitutionality of these statutes is not before the Court. In a recent state court proceeding involving the attempted enforcement of the criminal provisions of said statutes, the state court held the statutes to be unconstitutional. These meeting places or public assemblages strike at the very theory upon which the Supreme Court ruled in the school segregation cases; the transportation cases, the park cases, etc. The reasoning is that members of the Negro race should not be precluded from associating with members of other races when it tends to deprive them of the opportunity of enjoying facilities which should be common to all, and from which the Negro will benefit equally with others. To assign this logic to the use of toilet facilities admittedly equal is, in the opinion of this Court, a bit far-fetched.

[4] Section 2002.1 of the Building Code of the City of Norfolk, effective April 15, 1948, states:

> "... Where Negroes and whites are accommodated there shall be separate toilet facilities provided for the former, marked plainly 'For Negroes Only'."

be imposed upon a white person who may use a rest room marked "Colored," or vice versa. It is merely a requirement on the builder and in no sense places any obligation on those who may elect to use the toilet facilities. No other ordinance of the City of Norfolk directs any person to use any specific rest room. It is true, of course, that the signs constitute an invitation to use by the separate races but, unlike the laws relating to segregation in public schools which have been declared unconstitutional, there is no existing statute or ordinance which declares the use of rest room facilities by members of races to be limited to what appears as lettering on the door thereof. It may be argued that a use contrary to the invitation appearing on the door could be prosecuted as "disorderly conduct" by reason of the broad interpretation placed upon that term in Virginia. *Collins v. City of Norfolk*, 186 Va. 1, 41 S. E. (2d) 448. Assuming arguendo that such an act would constitute "disorderly conduct" and thereby subject a person to criminal prosecution, it is settled law that a court of equity will not lend its hand to restrain a criminal prosecution based upon a state law or city ordinance, even if the constitutionality of the same be involved, since this question can be raised and determined in the criminal case, with review by the higher courts, as well as in a suit for injunction. *Douglas v. Jeanette*, 319 U. S. 157, 163-164. This is especially true where the only threatened action is a single prosecution of an alleged violation. It is only where there is a clear showing of danger of immediate irreparable injury that equity will interfere. *Spielman Motor Co. v. Dodge*, 295 U. S. 89; *Beal v. Missouri Pacific R. Corp.*, 312 U. S. 45, 49; *Sterling v. Constantin*, 287 U. S. 378; *N. A. A. C. P. v. Patty*, E. Supp. ). Such is not the case here. There have been no threats or orders to plaintiff with respect to using the rest rooms in the state courthouse building. Surely this

Court cannot anticipate what the consequences or outcome of such action would be.

Under the laws of the State of Virginia, it is abundantly clear that the judges maintaining their courts therein have the control over the building. Section 15-686 of the *Code of Virginia*, 1950, places an obligation upon the board of supervisors of every county and the council for every city to provide a courthouse, clerk's office and jail. The fee simple title remains with the county or city, as the case may be, and the governing bodies are chargeable with the cost of acquisition and the duty of keeping the same in good order. If the governing body fails to maintain the courthouse in a proper state of repair, *or if it is otherwise insufficient*, the state court may issue a rule, to show cause, why a peremptory mandamus should not issue commanding them to cause the courthouse to be made secure, or put in good repair, or *rendered otherwise sufficient*. *Code of Virginia*, §15-693.1. This last section adequately illustrates the propriety of declining jurisdiction in the instant case, for, if this Court proceeded to grant the relief and ordered the defendants to remove the signs in question, the judges of the state court could forthwith proceed to grand mandamus and cause the signs to be again placed upon the doors of the rest rooms.

Other provisions of the law point to the control granted to judges of the state courts with respect to the courthouse. Under §15-690 and §15-691, rooms in courthouses may be rented with the approval of the judges, and entire buildings may similarly be leased with the approval of the judges, but the lease may be terminated when, in the opinion of the judges, the building is needed for a courthouse, clerk's office or jail.

When we examine the duties of the City Manager, Director of Public Safety, and Director of Public Works, we find nothing which imposes upon these officials any discretion with respect to the control of the state courthouse. The City Manager is the administrative head of the municipal government; the Director of Public Works apparently has nothing to do with public buildings; the Director of Public Safety is the chief *administrative* authority in all matters pertaining to the erection, maintenance, repair, occupancy and inspection of buildings under such regulations as may be ordained by the council. But the authority given to these officers is clearly subject to the state law granting to the judges the control over the state courthouses. *Supervisors of Bedford v. Wingfield*, 27 Gratt. (68 Va.) 329; *Belvin v. City of Richmond*, 85 Va. 574, 8 S. E. 378.

The action herein must be dismissed for the reason that the defendants do not have control over the courthouse. Together with the Judge of the Corporation Court of the City of Norfolk, who apparently is the individual in ultimate legal control of the courthouse, the present defendants; excepting the Director of Public Works, could undoubtedly be classified as proper parties, but against these defendants alone no relief can be granted.

There is likewise serious doubt whether this action can be maintained as a "class action" under Rule 23(a) of the Federal Rules of Civil Procedure. The suit is instituted in the name of the plaintiff "who sues for himself and on behalf of others similarly situated, viz., Negro attorneys at law practicing in Norfolk, Virginia." The record discloses that there are fifteen Negro attorneys licensed to practice law in Norfolk, at least two of whom are women. There is no suggestion that plaintiff endeavored to bring in other

Negro attorneys as parties plaintiff or defendant. Manifestly plaintiff does not represent a class so numerous as to make it impracticable to bring them all before the court as provided by Rule 23 (a). As a class action the case falls, but this would not prevent the granting of relief to the plaintiff if he is otherwise entitled to the same.

It becomes unnecessary to consider plaintiff's insistence that the Court take judicial notice of a five-page document entitled "Motion for Judicial Notice." While such a motion is foreign to any known procedure in law, it is sufficient to state that most of the material contained therein is not the proper subject of judicial notice. In fact, the Court disagrees with many of the statements made in said document.

In the able and exhaustive brief on the subject filed by the City Attorney of the City of Norfolk, it is suggested that the "separate but equal" doctrine may still exist with respect to public rest rooms. It is certainly true that if anything remains of this doctrine, it could be upheld in a case such as presented herein. The underlying reasons for the rejection of the "separate but equal" doctrine would not appear to be applicable to toilet facilities, although since the decision in the celebrated case of *Brown v. Board of Education*, supra, the doctrine has been considered as abolished in public schools, public parks, public golf courses, public swimming pools, municipally operated restaurants, public transportation facilities, and other public functions. There is, at least, a suggestion by the district court in *Plummer v. Casey*, 148 F. Supp. 326 (1955), affirmed sub nom *Derrington v. Plummer*, 5 Cir., 240 F. (2d) 922, cert. denied sub nom *Casey v. Plummer*, 353 U. S. 924, to the effect that if separate and equal public cafeterias had been provided for white and colored persons, the result of the

case would have been different. It is now universally accepted that property acquired, maintained, and operated by the Federal, State and local governments shall be made equally available to all races, subject to reasonable rules and regulations. *Tate v. Department of Conservation and Development*, 133 F. Supp. 53, affirmed 4 Cir. 231 F. (2d) 615. It may well be that the maintenance of separate but equal toilet facilities for the races falls within the classification of a reasonable rule and regulation, particularly where the courthouse itself is available to all races. Certainly it could not be argued that the water closets reserved for the two judges should be made available to the general public merely because of the principle of law above stated. However, this Court leaves for the judgment of more capable jurists the interesting question raised by the City Attorney.

Counsel for the defendants will prepare an order sustaining defendants' motion for summary judgment. The Court will treat the defendants' motion to dismiss as a motion for summary judgment pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Plaintiff's motion for summary judgment will be denied. Costs are assessed against the plaintiff.

Signed: WALTER E. HOFFMAN,
United States District Judge

Norfolk, Virginia
February 26, 1958.

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

PER CURIAM:

E. A. Dawley, Jr., an attorney of the Negro race practicing law at Norfolk, Virginia, seeks in this case a declaratory judgment and a permanent injunction restraining the City of Norfolk, Virginia, and certain of its administrative officers from maintaining certain signs in the State courthouse in that city indicating the segregation of the races in the public restrooms maintained in the building for men and women. The District Judge after hearing, without expressing approval of the practice and without prejudice to the right of the plaintiff to seek an appropriate remedy in the State court, dismissed the complaint. We think this action was properly taken. Whether or not the Federal court should take cognizance of the case and grant the relief prayed was within the sound discretion of the District Judge sitting in a court of equity. The matter was one which affected the internal operations of the court of the State and within its power to regulate. Under these circumstances, interference on the part of the Federal court was not required and the action of the District Judge in dismissing the case was in accord with the principles laid down in *Pennsylvania v. Williams*, 284 U.S. 176, 185.

*Affirmed.*

**Rule 23. Class Actions**

**(a) Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.